

VZCZCXRO7027  
OO RUEHROV  
DE RUEHNR #1170/01 1280639  
ZNR UUUUU ZZH  
O 070639Z MAY 08  
FM AMEMBASSY NAIROBI  
TO RUEHC/SECSTATE WASHDC IMMEDIATE 5713  
INFO RUCNIAD/IGAD COLLECTIVE  
RUEHDS/AMEMBASSY ADDIS ABABA 0069  
RUEHDR/AMEMBASSY DAR ES SALAAM 5959  
RUEHDJ/AMEMBASSY DJIBOUTI 5253  
RUEHKM/AMEMBASSY KAMPALA 2794  
RUEHKH/AMEMBASSY KHARTOUM 2034  
RUEHLO/AMEMBASSY LONDON 2808  
RUEHFR/AMEMBASSY PARIS 2731  
RHMFIUU/CDR USCENTCOM MACDILL AFB FL  
RHMFIUU/CJTF HOA

UNCLAS SECTION 01 OF 03 NAIROBI 001170

SIPDIS

LONDON AND PARIS FOR AFRICA WATCHERS

E.O. 12958: N/A

TAGS: [PREL](#) [PHUM](#) [PGOV](#) [KDEM](#) [KE](#)

SUBJECT: UPDATE ON COMMISSION OF INQUIRY INTO POST-ELECTION  
VIOLENCE AND COMMISSION FOR TRUTH, JUSTICE, AND  
RECONCILIATION

REF: NAIROBI 969

-----  
Summary  
-----

1. As a result of the Kofi Annan-led mediation efforts to end Kenya's post-election crisis, Kenya's political leaders agreed to form a Commission of Inquiry on Post-Election Violence (Violence Commission) and a Truth, Justice, and Reconciliation Commission (TJRC). The Violence Commission is preparing to begin work; its Kenyan Chair and two international Commissioners have been appointed and are drafting rules of procedure and work plans. The TJRC has not yet been formed. Enabling legislation for the TJRC has been gazetted and should be debated in parliament soon. TJRC commissioners have not been named. Civil society groups have called for more transparency in the work of these commissions and have criticized aspects of the TJRC draft legislation. A third commission, the Independent Review Commission, has already begun its work on a top-to-bottom review of the flawed 2007 elections (reftel). A fourth commission on constitutional reform is still in the discussion stage. We will follow the work of these commissions and will engage with political leaders when necessary to encourage non-interference in their work and implementation of the commissions' recommendations. End Summary.

-----  
Commission of Inquiry on Post-Election Violence  
-----

2. The Commission on Violence is a non-judicial body composed of three Commissioners -- a Kenyan Chair and two internationals who are either respected jurists or experts in communal conflict. The Commission on Violence has begun setting up shop and informally receiving evidence; we expect it to begin formal operations in the near future. Its mandate is for three months, with a possible one-month extension. The Violence Commission plans to investigate facts related to the acts of violence that followed the 2007 Presidential elections, including acts and omissions of state security agencies. At the conclusion of its work, the Violence Commission will prepare its report, which will contain findings of fact and recommended measures to prevent future violence as well as proposed redresses or legal actions. The work of the Commission is expected to be considered by the TJRC as it undertakes its investigations.

¶3. The Panel of Eminent African Personalities (the Panel), in consultation with Party of National Unity (PNU) and Orange Democratic Movement (ODM) negotiating teams, has named Kenyan Appellate Judge Philip Waki as Chair. (Note: Waki had been suspended from the bench due to allegations of corruption. However, he fought the allegations and a tribunal reinstated him. End Note.) The international commissioners appointed are Pascal Kambale, a Congolese human rights lawyer currently working with the Open Society Institute in New York, and Gavin McFayden, a former assistant police commissioner of the New Zealand national police. The team is currently formulating its rules of procedure and work plan. It should begin work by the end of May.

-----  
The Truth, Justice, and Reconciliation Commission  
-----

¶4. The TJRC must be established by an act of parliament, which has yet to occur. Its mandate will be to investigate human rights violations committed by the state, groups, or individuals since Kenya's independence in December 1963. These violations include politically-motivated violence, community displacements, settlements, and evictions. The TJRC may also investigate economic crimes -- such as corruption and historical land injustices -- which have contributed to conflict and violence in Kenya. While its terms of reference limit the TJRC to investigating post-independence events, it may look into pre-independence events to understand root causes that may have led to

NAIROBI 00001170 002 OF 003

post-independence human rights violations.

¶5. The TJRC will have seven Commissioners (three internationals and four Kenyans) with gender balance taken into account in making appointments. The Kenyan Commissioners will be chosen through a consultative process, with public input. The appointment of international commissioners will be made by the Panel of Eminent African Personalities (the Panel), taking into account public input, but subject to agreement of the PNU and ODM negotiating teams.

¶6. The TJRC has a two-year mandate, after which it will make recommendations to advance reconciliation as well as institutional and other reforms. It may recommend prosecutions for past acts. The TJRC will deliver its report to the President and publish the report within 14 days of delivery. Parliament also will debate the report.

¶7. The Attorney General's Office has prepared a TJRC Bill and consulted with respected lawyers representing prominent non-governmental organizations. Contacts involved in the review were supportive of the draft generally, stating that it reflected the spirit of the agreement. We hear from parliamentary sources that the TJRC Bill will be gazetted on May 9. At parliament, the bill will be considered by the Legal Affairs Committee, which will also receive public input on the bills and then send the Bill for debate to the entire house.

-----  
Civil Society Criticize Process  
And Substance of Draft TJRC Bill  
-----

¶8. Civil society organizations (CSOs) have criticized the shortage of public consultations on the TJRC Bill. CSOs have also criticized the substance of the Bill as drafted by the AG's Office. There are concerns that the mandate of the TJRC contained in the Bill is too broad and will prevent it from completing its work within its two-year mandate. They have criticized tight timelines for the selection of commissioners and the inclusion of amnesty provisions which could be

interpreted to offer amnesty for perpetrators of crimes against humanity or war crimes, in abrogation of Kenya's international obligations. They also criticize that the Minister of Justice is granted, along with the Treasury, authority to "scrutinize and approve" the TJRC budget and have input into the compensation for staff and commissioners.

They also object to the Implementation Committee being formed by, and reporting to, the Minister of Justice. They fear this expansive role could be used for political purposes. Another major concern is the inclusion of a reparations process administered by the TJRC, which they fear would skew the mission of the TJRC to being largely about reparations, to the detriment of truth-finding and restorative justice.

-----  
Constitutional Reform Commission  
-----

¶9. The negotiating parties at the Annan-led mediation talks also agreed to form a constitutional reform commission. Currently, no steps have been taken to establish this commission. The need for this commission is still being debated. Strong sentiment from parliament -- which considers constitution-making its bailiwick -- and the existence of the African Union Secretariat, left behind by Kofi Annan to handle the reform Agenda negotiated by the parties, may make this commission redundant. We will continue to follow developments.

-----  
The U.S. Role  
-----

¶10. We are working the United Nations, the European Union, its member state missions and other like-minded missions to

NAIROBI 00001170 003 OF 003

closely follow the work of the commissions to help ensure that they deliver a credible result. We chair or co-chair donor committees focused on each of the commissions. We should consider providing necessary technical/funding support if and when needed. We have made clear to the coalition government at the highest levels that we attach great importance to the work of the commissions and to the carrying out of the reform agenda (constitutional, electoral, land).

-----  
COMMENT  
-----

¶11. Kenya has clearly caught commission fever. It would be premature to call this too much of a good thing, but that possibility certainly bears watching. On the other hand, it is indisputable that there is a mammoth amount of work to be done to repair deep fissures within Kenyan society and government, so perhaps there is a place for these organizations. In any event, the standing up of these commissions is moving forward. Critical issues remain, such as the adoption of rules of procedure, evidence, work plans and, in the case of the TJRC, the appointment of commissioners. The resolution of these issues will determine the transparency and effectiveness of the commissions.

¶12. Finally, we note that the mandates of the Commission on Violence and the TJRC could at times be at odds with one another, as their respective "retributive" and "restorative" justice will almost certainly deter some potential witnesses. Nevertheless, the commissions represent the interests (and legitimate grievances) of different groups of Kenyans, and neither can be ignored. It is important that these Commissions break with prior practice -- commissions of inquiry historically have resulted in little or no action in this country -- and deliver on Kenyans' high expectations.

End Comment  
RANNEBERGER